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**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

UNITED STATES OF AMERICA,	}	Case No.: 2:16-mj-00564-NJK
Plaintiff,		
vs.		
BENYIAHIA HEBBAR,	}	MOTION TO WITHDRAW GUILTY PLEA
Defendant		

COMES NOW, Defendant BENYIAHIA HEBBAR (“HEBBAR”), by and through his counsel of record, DUSTIN R. MARCELLO, ESQ., of the law firm of PITARO & FUMO, CHTD., hereby moves this Honorable Court to allow Defendant BENYIAHIA HEBBAR (“Hebbar”) to withdraw his previously entered guilty plea.

This Motion is made and based upon all the papers and pleadings on file herein, the attached points and authorities in support hereof, and oral argument at the time of hearing, if deemed necessary by this Honorable Court.

DATED this 18th day of February 2018

PITARO & FUMO, CHTD.

/s/ Dustin R. Marcello, Esq.._____.

DUSTIN R. MARCELLO, ESQ.
Nevada Bar No.: 10134

MEMORADUM OF POINTS AND AUTHORITIES

STATEMENT OF FACTS

The Incident

The case against Hebbar is straightforward. An Informant claims Hebbar wanted to purchase a firearm from the Informant. The Informant, working at the direction of the Government, claims he negotiated to sell Hebbar a stolen machine gun. The Informant provided photographs of an AR-15 and claims he told Hebbar the gun in the picture was a machine gun stolen from a train. The Informant then met Hebbar and produced an inoperable AR-15 that the Informant claims was wanted for purchase by Hebbar. Agents then arrested Hebbar. This case followed.

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The Complaint

On August 15, 2016, Defendant, BENYIAHIA HEBBAR (“Hebbar”) was charged by way of Criminal Complaint with one (1) Count of Possession of a Machine Gun in violation of 26 United States Code 5861(d) and 5871. (Doc. 1)

Arraignment and Detention

Hebbar appeared for initial arraignment on August 15, 2016. The Federal Public Defender’s Office was initially appointed. (Doc. 4). After a detention hearing, Hebbar was ordered detained pending trial based on a finding he represented a flight risk and danger to the community. (Doc. 6).

The Indictment

On November 9, 2016 a Grand Jury returned an Indictment charging Hebbar with one (1) Count of Unlawful Receipt or Possession of an Unregistered Firearm in violation of 26 U.S.C. 5812, 5861, and 5871. (Doc. 18).

Plea Agreement

The initial plea agreement was filed on September 14, 2017.

According to the Agreement, Hebbar was pleading guilty to the unlawful receipt or possession of an unregistered firearm in violation of 26 U.S.C. Sections 5812 and 5861 (b). (Doc. 57, pp. 3-4). The Agreement contained give numerated paragraphs of facts in support of the elements of the offense being pled. *Id.* at 5-6.

1 The Agreement called for a base offense level of 18 adjusted to 15 based on
2 a reduction for acceptance and timeliness. (Doc. 57, p. 7). Hebbar's anticipated
3 criminal history category was I.
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5 The Government explicitly stated in the Agreement it would argue for the
6 low end of the guidelines. (Doc. 57, p. 10-1).
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8 **Change of Plea Hearing**

9 The initial change of plea took place on September 29, 2017. (Doc. 62). It
10 appears after this hearing, a modified plea agreement was filed with the Court.
11 The essential terms and facts alleged remained the same. The plea agreement
12 filed on September 29, 2017, was signed and dated by all parties (Doc. 62, p. 14).
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15 **Lack of Knowledge of Charges and Legal Defenses**

16 Hebbar was initially appointed Monique Kirtly, Esq., ("Ms. Kirtly") to
17 represent him in this case. Ms. Kirtly was appointed to represent September 27,
18 2016. (Doc. 11). After the filing of a number of documents by Hebbar, Ms. Kirtly
19 withdrew from representation on January 11, 2017. (Doc. 37). Thereafter,
20 attorney John George, Esq. ("Mr. George") was appointed to represent Hebbar.
21 (Doc. 38).
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25 According to Hebbar, Mr. George spoke in general terms but never
26 provided specific information or advice about a defense strategy. Additionally,
27 Hebbar claims he was yelled at and mistreated by Mr. George sufficient that
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1 Hebbar believes he was bullied into taking an offer. Specifically, Hebbar claims
2 he never reviewed the United States Code, never was provided information as the
3 CHS in this case, and was never advised that he could file a motion to dismiss the
4 case based on Government misconduct in based on the Government's use of a
5 lying informant to prosecute Hebbar.
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8 Hebbar further asserts that other than discussing the moral question of guilt
9 or innocence, there was no discussion of the legal defenses or strategies that could
10 be asserted to prove Hebbar's innocence. Hebbar claims that George told him if
11 he didn't plead guilty Mr. George would not ask questions at trial and that Hebbar
12 would be convicted and spend more time in prison than if he plead guilty.
13 Additionally, Hebbar claims Mr. George, told Hebbar that he would have to admit
14 guilt in order to present a defense.
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16 **Threat of Additional Charges**

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18 Hebbar claims that the prosecutor threatened Hebbar with further charges or
19 with more time if he did not accept a plea. Specifically, Hebbar claims the
20 Government informed him they would seek a more stringent sentence and add a
21 charge for possession of a machine gun.
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23 **Motion to Withdraw Plea**

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25 Following entry of the plea, but before sentencing, Mr. George withdraw
26 from representation on December 14, 2017. Thereafter on December 22, 2017,
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1 current counsel was appointed. After numerous meetings and discussion on the
2 pros and cons of seeking withdrawal of a plea, current Counsel now files this
3 Motion to Withdraw Plea at the direction of Hebbbar based on the issues herein.
4 Sentencing is currently scheduled for February 28, 2018.
5

6 7 **ARGUMENT**

8 **HEBBAR SHOULD BE PERMITTED TO WITHDRAW HIS PLEA**

9 **Legal Standard Under Fed. R. Crim. Proc. 32**

10 A criminal defendant is allowed to withdraw a plea of guilty at any time
11 before sentencing after proffering any “fair and just” reason for the plea to be
12 withdrawn.¹ In this respect, the Advisory Committee on Criminal Rules has
13 offered the following statement regarding what circumstances should be
14 considered in determining the “fair and just” standard:
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20 Although the terms “fair and just” lack any pretense of
21 scientific exactness, guidelines have emerged in the
22 appellate cases for applying this standard. Whether the
23 movant has asserted his legal innocence is an important
24 factor to be weighed, as is the reason why the defenses
25 were not put forward at the time of the original pleading.

26 ¹ Fed. R. Crim. P. 11(d)(2)(B); see *United States v. Alber*, 56 F.3d 1106, 1111 (9th Cir. 1995) (construing
27 the version of Rule 11(d)(2)(B) that used to be placed in Fed. R. Crim. P. 32(e)); cf. *United States v. Ruiz*, 257 F.3d
28 1030, 1031 (9th Cir. 2001) (*en banc*) (“the ‘fair and just standard’ applies to any motion for plea withdrawal that is
made prior to a defendant’s sentencing.”). Withdrawal of a guilty plea before sentencing is liberally granted
although withdrawal is not granted as a matter of right. See *United States v. Castello*, 724 F.2d 813, 814 (9th Cir.
1984).

1 The amount of time which has passed between the plea
2 and the motion must also be taken into account.

3 Fed. R. Crim. P. 32 advisory committee's note (1983) (citations and
4 internal quotation marks omitted)

5 The defendant has the burden of demonstrating the existence of
6 at least one of these conditions. *See* Fed.R.Crim.P. 11(d)(2)(B);
7 *cf. United States v. Davis*, 428 F.3d 802, 805 (9th Cir. 2005).

8 While there is no per se right to withdrawal, the standard is liberally
9 construed in favor of defendants whose requests should be normally be freely
10 granted. As the Committee Note indicates, the burden is to prove the existence of
11 a basis of the fair and just reason, with nothing more required. Once the existence
12 of a basis is proven a Defendant has met his burden to show a fair and just reason
13 for withdrawal is present and relief should be granted.

14 Fair and just reasons for withdrawal include inadequate Rule 11 plea
15 colloquies, newly discovered evidence, intervening circumstances, or any other
16 reason for withdrawing the plea that did not exist when the defendant entered his
17 plea.” *United States v. McTiernan*, 546 F.3d 1160, 1167 (9th Cir. 2008) (internal
18 citation omitted); *accord United States v. Showalter*, 569 F.3d 1150, 1154 (9th
19 Cir. 2009). "While the defendant is not permitted to withdraw his plea 'simply on
20 a lark,' the 'fair and just standard' is generous and must be applied liberally."
21 *McTiernan*, 546 F.3d at 1167 (*quoting United States v. Hyde*, 520 U.S. 670, 676-
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77, 117 S. Ct. 1630, 137 L. Ed. 2d 935 (1997)). Thus, "a defendant does not have to prove that his plea is invalid in order to establish a fair and just reason for withdrawal before sentencing." *United States v. Davis*, 428 F.3d 802, 806 (9th Cir. 2005); *see also United States v. Garcia*, 401 F.3d 1008, 1012 (9th Cir. 2005) ("[We have] squarely rejected the proposition that the fact that a plea is voluntary, knowing, and intelligent forecloses an attempt to withdraw it prior to sentencing."). Nor must the defendant "proclaim his innocence." *Garcia*, 401 F.3d at 1012.

Timeliness

Related to the fair and just standard is the question of timeliness in seeking to withdraw a plea. The shorter the delay, the more likely a motion to withdraw will be granted, and a defendant's reasons for filing such a motion will be more closely scrutinized when he has delayed his motion for a substantial length of time." *United States v. Baez*, 87 F.3d 805, 808 (6th Cir. 1996).

Lack of Prejudice

Hebbar sought to withdraw his plea almost immediately after it was entered. There was a minor delay when prior counsel withdrew, but it was not a significant period of time. There would be very little prejudice to the Government in trying this case. It is essentially just one informant and a case agent testifying at a trial. There is no complexity of the issues and this is a very straightforward

1 case. There would be no prejudice to the Government either through spoliation of
2 evidence or expenditure of resources. Accordingly, this factor weighs in favor of
3 allowing Hebbar to withdraw his plea.
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6 **HEBBAR'S GUILTY PLEA WAS NOT ENTERED KNOWINGLY**
7 **AND VOLUNTARILY WITH FULL KNOWLEDGE OF THE CASE**
8 **AGAINST HIM AND AFTER BEING AWARE OF DEFENSES HE**
9 **HAD TO THE CHARGES AGAINST HIM**

10 As noted above, one factor to consider is whether a guilty plea was entered
11 into knowingly and voluntarily. A plea can be rendered involuntary if it is the
12 product of an objectively reasonable misapprehension of law and facts. Further, a
13 defendant must be fully aware of the consequences of his plea and the plea must
14 not be the product of duress.
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16 When the basis for withdrawal is erroneous or inadequate legal advice, the
17 defendant's burden is simply to show that proper advice "could have at least
18 plausibly motivated a reasonable person in [the defendant's] position not to have
19 pled guilty had he known about the [grounds] prior to pleading." *Garcia, supra*
20 401 F.3d at 10121011-12. The defendant need not show that a legal argument
21 foregone as a result of incorrect or incomplete advice would have been
22 "successful on its merits." *McTiernan*, 546 F.3d at 1168.
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24 In this case, Hebbar was not made aware as to facts substantially affecting
25 the credibility of the confidential informant in this case. Since pleading, Hebbar
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1 claims evidence that can be presented at an evidentiary hearing showing the
2 confidential informant was lying as to his interactions with Hebbar. This case is
3 based almost exclusively on the testimony of the informant claiming Hebbar
4 wanted to purchase and was intending to purchase a machine gun or unregistered
5 firearm from the informant. Hebbar contends that there was never an agreement
6 to purchase a firearm, but even if there was there certainly was no agreement to
7 purchase any type of illegal firearm and that the informant, for selfish benefit, lied
8 about his interactions with Hebbar in order to facilitate charging Hebbar in this
9 case.
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14 After pleading in September, Hebbar was made aware of the investigation
15 done by Jeff Danik, retired FBI Agent that acted as an investigator on the case.
16 Mr. Danik provided information that the Informant had engaged in illegal
17 activities and had attempted to defraud Hebbar before making him a target for the
18 FBI. Moreover, there was information showing that the Informant had fostered
19 inappropriate relationships when acting as an informant, had financial transactions
20 with people he would then testify against as an Informant, and had engaged in
21 stealing personal identifiers of others. This information appears to be documented
22 to Hebbar's prior attorney after the plea. It may still be protected by attorney
23 client privilege until it is formally waived by Hebbar and is not being attached to
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1 this Motion, but can be provided either at the direction of the Court or during an
2 evidentiary hearing if it is granted.
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4 Had Hebbar been aware of the information regarding the Informant and a
5 defense strategy attacking proof that Hebbar knowingly engaged in illegal
6 activity, Hebbar would not have accepted the plea and would have elected to go to
7 trial. Accordingly, Hebbar should be permitted to withdraw his plea.
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10 **HEBBAR'S PLEA IS VOID AS IT WAS INDUCED BY ACTUAL**
11 **THREAT OR DELEMUS' REASONABLE BELIEF THAT THE**
12 **GOVERNMENT WOULD SEEK MORE CHARGES AGAINST HIM**
13 **IF HE REFUSED TO CHANGE HIS PLEA**

14 Given that a plea of guilty waives a plethora of constitutional rights
15 afforded criminal defendants it must be the product of a knowing and intelligent
16 act, entered into voluntarily, with free and unrestrained will. *See Haynes v. State*
17 *of Washington*, 373 U.S. 503, 514 (1963); *see also Brady v. United States*, 397
18 U.S. 742, 748 (1970) (explaining that a guilty plea is valid only if voluntarily and
19 intelligently made). A plea is void if it is “induced by promises or threats which
20 deprive it of the nature of a voluntary act.” *Machibroda v. United States*, 368 U.S.
21 487, 493 (1972). The subjective state of mind of the accused is relevant to the
22 inquiry. *See Miller v. Fenton*, 474 U.S. 104, 113-16 (1985).
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1 A plea is void if it is “induced by promises or threats which deprive it of the
2 nature of a voluntary act.” *Machibroda v. United States*, 368 U.S. 487, 493
3 (1972).
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5 Prior to entering the plea, Hebbar claims that it was made known to him
6 that if he did not accept the Government’s plea offer that the Government would
7 seek a more severe sentence and would add charges alleging possession of a
8 machine gun against Hebbar. This fear, if established, would entitle Hebbar to
9 relief as his plea would be void.
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12 **HEBBAR ASSERTS HIS LEGAL INNOCENCE TO THE CHARGES**
13 **TO WHICH HE HAS PLEAD**

14 The assertion of a claim of innocence is another relevant factor in the
15 application of Fed. R. Crim. P. 32(e)’s fair and just reason standard. *See United*
16 *States v. Horne*, 987 F.2d 833, 837 (D.C. Cir. 1993); *cf. United States v. Ford*, 993
17 F.2d 249, 251 (D.C. 1993) (explaining a court must consider whether a defendant
18 has asserted a viable claim of innocence).
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21 Hebbar agreed to the statutory elements of the offenses under the advice of
22 Counsel, but was continuously asserting his innocence to the main contention at
23 issue – whether Hebbar actually intended to engage in illegal conduct.
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26 **HEBBAR REQUESTS AN EVIDENTIARY HEARING ON THE**
27 **ISSUES RAISED IN THIS MOTION**
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1 The evidentiary hearing would be limited to the following issues: (1) Was
2 Hebbar aware of all defenses prior to entering the plea, (2) Whether Hebbar was
3 aware of evidence showing the informant was a liar, self-interested and had a
4 financial interest in Hebbar's prosecution, (3) whether Hebbar entered the plea
5 based on threats by the Government, (4) and other factor showing Hebbar's plea
6 was not free and knowingly made. It is respectfully requested that an evidentiary
7 hearing granted to establish a record of any and all factual assertions entitling
8 Hebbar to relief.

9 CONCLUSION

10 Based on the forgoing, it is respectfully requested that this Court permit
11 Hebbar to withdraw his previously accepted plea of guilty.

12 CERTIFICATE OF SERVICE

13 On February 18, 2018, the undersigned caused a true and correct copy of
14 the aforementioned **MOTION TO WITHDRAW PLEA** via the ECF system.

15 **PITARO & FUMO, CHTD.**

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